1976

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 172.

JOHN BROWNFIELD, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED OCTOBER 2, 1901.

(18,276.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 18, 1902.

1 UNITED STATES OF AMERICA:

Supreme Court of South Carolina, Spring Term, 3d Tuesday in April; Fall Term, 4th Tuesday in November.

Henry McIver, chief justice, Cheraw, S. C.
Y. J. Pope, associate justice, Newberry, S. C.
Eugene B. Gary, associate justice, Abbeville, S. C.
Ira B. Jones, associate justice, Lancaster, S. C.
U. R. Brooks, clerk.

COLUMBIA, S. C., 190–.

UNITED STATES OF AMERICA:

Supreme Court of South Carolina.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record as filed in this office and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court, in the city of Columbia, this 4th September 1901.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of the State of So. Ca.

2 UNITED STATES OF AMERICA, ss:

To the State of South Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of South Carolina, wherein John Brownfield is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry McIver, chief justice of the supreme court of the State of South Carolina, this thirtieth day of August, in the year of our Lord one thousand nine hundred and one.

HENRY McIVER,
Chief Justice of the Supreme Court of the State of South Carolina.

3 A copy of the within was handed to me this day, Sept. 2, 1901.

JOHN S. WILSON,
Sol'r 3rd Circuit, State of South Carolina.

Manning, S. C.
1—172

4 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Brownfield, appellant, and The State of South Carolina, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-
5 struction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of August, in the year of our Lord one thousand nine hundred and one.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
Clerk of the Circuit Court of the United States
for the District of South Carolina.

Allowed by
HENRY McIVER,
Chief Justice of the Supreme Court
of the State of South Carolina.

6 [Endorsed:] Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 2 Sep- 1901 U. R. Brooks, clerk.

7 Know all men by these presents, that we, John Brownfield as principal, and J. A. Baxter and J. B. Washington, as sureties, are held and firmly bound unto the State of South Carolina in the full and just sum of two hundred and fifty dollars, to be paid to the said State of South Carolina, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 26th day of August, in the year of our Lord one thousand nine hundred and one. Whereas, lately at a session of the supreme court of the State of South Carolina, in a suit depending in said court, between The State of South Carolina and John Brownfield defendant, a judgment was rendered against the said John Brownfield and the said John Brownfield having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the State of South Carolina, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said John Brownfield shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN BROWNFIELD. [L. S.]
J. A. BAXTER. [L. S.]
J. B. WASHINGTON. [L. S.]

Sealed and delivered in presence of
T. ST. MARKS SASPORT,
As *as* to sureties.
A. F. HORRY,
As to sureties.
G. B. DURANT.

Approved by—
HENRY McIVER,
Chief Justice of the Supreme Court of South Carolina.

STATE OF SOUTH CAROLINA, }
County of Georgetown. }

Personally appeared before me J. A. Baxter and J. B. Washington both of whom being duly sworn, say, that they are each of them residents and freeholders within the State of South Carolina, and that they are each of them worth the sum of two hundred and fifty dollars over and above their liabilities and exclusive of the amount exempt by law.

J. A. BAXTER.
J. B. WASHINGTON.

Sworn to before me this 26th day of August, 1901.
J. L. MITCHELL,
Notary Public for So. Ca.

[Endorsed:] Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 2 Sep. 1901 U. R. Brooks, clerk.

8 4760.

THE STATE OF SOUTH CAROLINA:

In the Supreme Ceurt, Third Circuit.

Appeal from Georgetown County.

THE STATE, Respondent,
vs.
JOHN BROWNFIELD, Defendant, Appellant.

Indictment for murder.

Brief.

J. L. Mitchell and W. J. Whipper, attorneys for appellant.
John S. Wilson, solicitor for the State, respondent.

The defendant, appellant, was indicted at the November term, 1900, of the court of general sessions for Georgetown county, for murder.

The cause came on for trial before Judge Ernest Gary and a jury in said court of general sessions for said county, and on the 15th day of the month.

The following is the indictment:

9 STATE OF SOUTH CAROLINA.
County of Georgetown.

At a court of general sessions began and holden in and for the county and State aforesaid, on the second Monday of November in the year of our Lord, one thousand and nine hundred, the jurors of and for the county aforesaid, in the State aforesaid, upon their oath, present, that John Brownfield, late of the county and State aforesaid. on the twenty-ninth day of September, in the year of our Lord one thousand and nine hundred, with force and arms, at Georgetown, in the county of Georgetown, and State of South Carolina, in and upon one James C. Scurry, in the peace of God and of the said State, then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said John Brownfield, with a certain pistol, loaded with gunpowder and leaden balls, and by him, the said John Brownfield, then and there had and held him, the said James C. Scurry, then and there feloniously, wilfully, and of his malice aforethought, with the said pistol loaded as aforesaid, did shoot, hit, penetrate and wound; giving to the said James C. Scurry thereby, in and upon the body of him, the said James C. Scurry, two mortal wounds; of which said mortal wounds, the said James C. Scurry thence continually languished until on the thirtieth day of September, in the year of our Lord, one thousand and nine hundred he there died.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Brownfield him the said James C. Scurry, then and there in the manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder against the form of the statute in such case made and provided, and against the peace and dignity of the State.

JOHN S. WILSON, *Solicitor.*

The defendant was arraigned.

The defendant's counsels then moved to quash the indictment upon the following grounds:

10 THE STATE OF SOUTH CAROLINA,
County of Georgetown.

In the General Sessions.

THE STATE
vs.
JOHN BROWNFIELD.

Indictment for murder.

Motion to Quash.

And now comes the defendant, John Brownfield, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment, selected no person or persons of color or of African descent, known as negroes, to serve on said grand jury; but, on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as negroes, because of their race and color; and that said grand jury was composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent, known as negroes, although consisting of and constituting about four-fifths of the population and of the registered voters in said city and county of Georgetown, and although otherwise qualified to serve as such grand jurors were excluded therefrom on account of their race and color and have been so excluded from serving on any jury in said court of general sessions for Georgetown county for a considerable time back, which is a discrimination against the defendant, since he is a person of color, and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States. All of which the defendant is ready to verify.

JOHN BROWNFIELD. [L. S.]

11 Sworn to before me this 15th day of Nov. A. D., 1900.

J. B. EDWARDS,
Notary Public, S. C.

This motion being overruled by the court, the defendant's counsels excepted. The defendant offered to introduce testimony to support these grounds. The defendant's counsels then challenged the array of grand and petit jurors upon the same grounds as were submitted in the motion to quash the indictment. This motion was also overruled, and the defendant's counsels excepted to said ruling.

Defendant arraigned and pleaded not guilty.

Testimony.

(Insert testimony.)

STATE OF SOUTH CAROLINA,
County of Georgetown.

In the General Sessions.

THE STATE
vs.
JOHN BROWNFIELD.

Murder.

Requests to Charge.

(1.) A private person may make an arrest without a warrant only in cases where he sees a felony committed, where such an arrest may prevent the commission of a felony, or where he has reasonable grounds to suspect that a felony has been committed, and that the party whom he seeks to arrest is the felon.—(Am. & Eng. Cy. of Law, 1st ed., vol. 1, 740–'41.)

(2.) A person may rightfully resist the attempt of another to enter his house for the purpose of illegally arresting him, and if
12 resistance by lawful means results in the death of the assailant, it is excusable homicide; but if by unlawful means but without malice, it is manslaughter. (Am. & Eng. Cy. of Law, 1st ed., vol. 17–18; vol. 9, 587; State *vs.* Scheele, 57 Conn., 307; U. S. *vs.* Terry, 41 Fed. Rep., 771; Wharton on Homicide, 54–'5.)

(3.) The party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant, and if he make an arrest without a warrant, or authority, he will not be considered as a legal officer entitled to the special protection of the law; and therefore, if a struggle ensue with the party injured and such officer be killed, the crime will be only manslaughter, and the killing of an officer attempting to make an unlawful arrest is justifiable, in case of a reasonable apprehension of bodily harm. (Am. & Eng. Cy. of Law, 1st ed., vol. I, 754; Wharton on Homicide, 59; Am. & Eng. Cy. of Law, 1st ed., vol. 17–21; State *vs.* Canteing, 34 Minn., 1.)

(4.) Officers not commonly known as such and private persons, in making an arrest, must show their warrants when demand is made by the person arrested; otherwise a resistance will be justified. (Am. & Eng. Cy. of Law, 2d ed., vol. 2, 842–'3; State *vs.* Curtis, I

Hayw., N. C., 471; Arnold *vs.* Steeves, 10 Wend., N. Y., 514; Wharton Law of Homicide, 58.)

(5.) That an unlawful arrest vests no authority in the one arresting, hence one so arrested has the right in such case to use as much force as may be necessary to regain his liberty, even to the actual taking of life. (Am. & Eng. Cy. of Law, 2d ed., vol 2, 852; State *vs.* Davis, 31 S. E. 62.)

(6.) That in no case can an arrest be made without a warrant, by an officer, for a misdemeanor, unless the offence be committed in his presence, nor can he arrest a party without a warrant for a misdemeanor which does not amount to a breach of the peace. (Am. & Eng. Cy. of Law, 2d ed., vol. 2, 878–'9.)

13 (7.) To prevent killing deputy who was seeking to arrest the accused for a felony without having the warrant in his possession, from being manslaughter or justifiable homicide, it must appear that the accused knew that the deceased was acting under authority. (Robinson *vs.* The State, 18 S. E., 1018, 93 Ga., 77.)

(8.) An arrest, even if lawful, made in such a menacing manner as to threaten death or bodily harm, is held to justify resistance even to the killing of an officer. (Am. & Eng. Cy. of Law, 2nd ed., vol. 2—980.)

(Refused.)

(9.) If the testimony shows that the deceased, J. C. Scurry, assaulted the defendant, John Brownfield, with a pistol in such a manner as to produce the belief that he was about to take the defendant's life or inflict upon him great bodily harm, at the time that he fired the fatal shot, it makes no difference whether said deceased intended to take the defendant's life or to do him bodily harm or not; the shooting was justifiable, the killing excusable and the defendant should be acquitted. (Wharton on Homicide, 215, 216, 217, and 219; State *vs.* Jackson, 32 S. C., 27, 10 S. E., 769; State *vs.* Symmes, 40 S. C., 383.)

(Refused.)

(10.) When one is assaulted in his own house, he is not required by law to retreat or back one step, and especially when such retreat will expose his person to the attack of his assailant. (Wharton Law of Homicide, 228; State *vs.* McGreer, 13 S. C., 464.)

(11.) That if the evidence shows that the accused actually believed that he was in such imminent danger of losing his life, or sustaining serious bodily harm, that it was necessary, for his own protection to take the life of his assailant; and that the circumstances in which he was placed were such as would, in the opinion of the jury, justify such a belief in the mind of a person possessed of ordinary firmness and reason, the defendant is entitled to be acquitted. (Wharton's Law of Homicide, 213; State *vs.* McGreer, 13 S. C., 464.)

14 (12.) While the law presumes malice from the mere fact of intentional killing, yet, when the facts attending the homicide are brought out, there is no room for such presumption, and malice must be proven beyond a reasonable doubt. Therefore, unless the jury believe, beyond a reasonable doubt, from the testimony produced, that the defendant when he fired the fatal shot, did

it with malice aforethought, they cannot find him guilty of murder. (State *vs.* Jones, 7 S. E., 296, 29 S. C., 201; State *vs.* Ariel, 38 S. C., 221, 16 S. E., 779.)

(13.) One attacked with a deadly weapon may repel force by force, and, if there be a manifest intent to commit a felony upon him, he is, under such circumstances, not obliged to retreat, but may pursue his adversary until he finds himself out of danger; and, if in such conflict, he happens to kill his adversary, such killing is justifiable and in self-defence, provided the elements of self-defense concur. (State *vs.* Murrell, 33 S. C., 83; 11 S. E., 682.)

(14.) While the State is bound to prove its case beyond a reasonable doubt, the defendant is only required to prove his plea of self-defense by the greater weight of the testimony, consequently, if the defendant has proven his plea of self-defence by the greater weight of the evidence, or the State has failed to prove its case beyond a reasonable doubt, the defendant must be acquitted. (State *vs.* Brown, 34 S. C., 41; 12 S. E., 662.)

(15.) If, upon the whole case, there be any reasonable, well-founded doubt in the minds of the jury, growing out of the evidence, as to the guilt or innocence of the accused, such doubt must be solved in his favor, and he be acquitted. State *vs.* Watson, 7 S. C., 65; State *vs.* Jackson, 36 S. C., 487; State *vs.* Paulk, 18 S. C., 514.)

(16.) If one who swears out a warrant attempts to make an arrest under such warrant, such attempt is illegal.

J. L. MITCHELL,
Defendant's Attorney.

15 The judge's charge was as follows:

(Insert judge's charge.)

Verdict of the Jury.

Guilty.

JNO. RICHARDSON, *Foreman.*

Sentence of the Court.

THE STATE
vs.
JOHN BROWNFIELD.

Murder.

It being solemnly demanded of the prisoner at the bar, if he hath anything to say why sentence of death should not be passed upon him, he saith nothing further, unless as he had before said, wherefore it is considered by the court (and pronounced as the judgment of the law) that the said John Brownfield be taken hence to the place where last he came, there to be kept in close and safe custody until Friday, the twenty-eighth day of December next; and that on that said Friday, between the hours of ten in the forenoon and two in the afternoon, he be taken to the place of private execution in the

county and there be hanged by the neck until his body be dead. And may God have mercy on his soul.

ERNEST GARY,
Presiding Judge.

17th November, 1900.

We hereby agree that his honor Judge Gary make a statement as to his rulings upon the motion to quash the indictment, and also as to the motion to challenge the arrays of grand and petit ju-
16 rors in the case, and also as to requests to charge, and such statement shall be the agreed statement for the purposes of this appeal.

J. L. MITCHELL AND
W. J. WHIPPER,
Attorneys for Defendant, Appellant.
JOHN S. WILSON,
Solicitor for State, Respondent.

Statement of Judge Gary.

On the motion to quash the venire, I overruled the same on two grounds

1. Because the statement of facts set out in the grounds for quashing the same, did not appear from the records or otherwise. That not being personally acquainted with the jurors selected, I could not assume the facts to be as alleged.

2. Because the constitution of this State prescribed the qualification of a juror in sec. 22 of article 5, in the following words: "Each juror must be a qualified elector under the provisions of this constitution, between the ages of twenty-one and sixty-five years and of good moral character." I then suggested that counsels could examine each juror on his *voir dire* and ascertain if he was qualified, and in the absence of any showing to the contrary, I was bound to assume that the jury commissioners had done their duty in the premises. As to the 16th request, I have no recollection, as I marked the requests presented and turned them over to the stenographer.

ERNEST GARY,
Presiding Judge.

May 4th, 1901.

17 THE STATE OF SOUTH CAROLINA,
County of Georgetown.

In the General Sessions.

THE STATE
vs.
JOHN BROWNFIELD.

Indictment for murder.

Please take notice that the above-named defendant, John Brownfield, appeals to the supreme court of South Carolina, from the rul-

ing judgment, and sentence of the court of general sessions in and for the county of Georgetown, made in the above-stated case, at the November term, 1900, of said court, and will move the said supreme court, at the next term thereof, to reverse said ruling and judgment and set aside said sentence, upon the following grounds, to wit:

1. Because his honor, Judge Gary, the presiding judge, erred in refusing defendant's motion to quash the indictment, on the ground that there was no member of the race to which the defendant belongs on the grand jury that found the said bill of indictment.

2. Because his honor, Judge Gary, the presiding judge, erred in refusing the challenge to the array of grand and petit jurors on same ground.

3. Because his honor, the presiding judge, erred in refusing to charge the jury, as requested by defendant's attorneys, as the eighth proposition. That "an arrest, even if lawful, made in such a menacing manner as to threaten death or bodily harm, is held to justify resistance even to the killing of an officer." (Am. & Eng. Cy. of Law, 2d ed., vol. 2—980.)

4. Because his honor, the presiding judge, erred in refusing to charge the jury in the above-entitled cause, as requested by defendant's attorneys, as the ninth proposition: That, "if the tes
18 timony shows that the deceased, J. C. Scurry, assaulted the defendant, John Brownfield, with a pistol in such a manner as to produce the belief that he was about to take the defendant's life or inflict upon him great bodily harm at the time that he fired the fatal shot, it makes no difference whether deceased intended to take the defendant's life or to do him bodily harm or not, the shooting was justifiable, the killing excusable, and the defendant should be acquitted." (Wharton on Homicide, 215, 216, 217 and 219; State *vs.* Jackson, 32 S. C., 27, 10 S. E., 760; State *vs.* Symmes, 40 S. C., 383.)

5. Because his honor, the presiding judge, erred in refusing to charge the jury as requested by defendant's attorneys, as the sixteenth proposition: That, "if one who swears out a warrant attempts to make an arrest under such warrant, such attempt is illegal."

J. L. MITCHELL AND
W. J. WHIPPER,
Attorneys for Appellants.

Dated Dec. 15, 1900.

To Hon. Ernest Gary, presiding judge, and John S. Wilson, Esq., solicitor 3rd circuit:

We agree that the foregoing shall constitute the brief for the supreme court in this case.

J. L. MITCHELL AND
W. J. WHIPPER,
Attorneys for Defendant, Appellant.
JOHN S. WILSON,
Soliciting Attorney for Respondent.

April 19, 1901.

Above signed with relation to case as settled by judge.

19 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

THE STATE, Respondent,
against
JOHN BROWNFIELD, Defendant, Appellant.

Opinion.

EUGENE B. GARY, *A. J.:*

The defendant was indicted, tried, and convicted of murder, at the November, 1900 term of the court of general sessions for Georgetown county in said State, and sentenced to be hanged on the 28th day of December 1900.

Upon his arraignment the defendant's attorneys made a motion to quash the indictment on the following grounds:

(Caption.)

"And now comes the defendant, John Brownfield, in his own proper person, and moves the court to set aside and quash the indictment herein against him, because the jury commissioners appointed to select the grand jury which found and presented said indictment, selected no person or persons of color or of African descent, known as negroes, to serve on said grand jury; but on the contrary, did exclude from the list of persons to serve as such grand jurors all colored persons or persons of African descent, known as negroes, because of their race and color; and that said grand jury was composed exclusively of persons of the white race, while all persons of the colored race or persons of African descent known as negroes, although consisting of and constituting about four-fifths of the population and of the registered voters in said city and county of Georgetown, and although otherwise qualified to serve as such grand jurors, were excluded therefrom on account of their race and color and have been so excluded from serving on any jury

20 in said court of general sessions for Georgetown county for a considerable time back, and which is a discrimination against the defendant, since he is a person of color, and of African descent, known as a negro; and that such discrimination is a denial to him of the equal protection of the laws, and of his civil rights guaranteed by the Constitution and laws of the United States. All of which the defendant is ready to verify.

JOHN BROWNFIELD. [L. S.]

Sworn to before me this 15th day of Nov. A. D. 1900.

J. B. EDWARDS,
Notary Public, S. C."

The motion was overruled and thereupon the defendant's attorneys excepted.

The defendant's attorneys then challenged the array of grand and petit jurors, upon the same grounds as were submitted, on the mo-

tion to quash the indictment. This motion was also overruled, and to this ruling the defendant's attorneys, likewise, excepted.

The defendant thereupon pleaded not guilty.

The testimony is not set out in the agreed case, upon which the appeal was heard by this court, but under the word "Testimony" are the words, "(Insert testimony.)" This, however, did not make the testimony a part of the agreed case. *In re* Estate of Perry 42 S. C. 183: Moore *v.* Perry 42 S. C. 369.

In the agreed case are also the words, "The judge's charge was as follows: (Insert judge's —.)" The charge was not inserted, and under the authorities just cited, was not a part of the agreed case.

The defendant appealed upon five exceptions, the fifth of which was withdrawn.

The first exception is as follows:

1. "Because his honor, Judge Gary, the presiding judge, erred in refusing defendant's motion to quash the indictment, on the
21 ground that there was no member of the race to which the defendant belongs on the grand jury that found the said bill of indictment."

The only question raised by this exception is, whether his honor the presiding judge erred, in refusing to quash the indictment, simply because no member of the race, to which the defendant belongs, was on the grand jury that found the bill of indictment.

In the first place, there is no provision of the constitution of South Carolina, nor any of its statutes or laws to the effect that a person on trial can move to quash an indictment on the ground that there was no member of the race to which he belongs, on the grand jury that found the bill of indictment against him.

The constitution, statutes and laws of South Carolina apply alike to the white and colored races, as to qualifications of jurors, without any discrimination whatever, on account of race color or previous condition of servitude.

The provisions of the constitution relative to the qualifications of jurors, were construed in Mew *v.* R'y Co. 55 S. C. 90 affirmed in State *vs.* Rafe 56 S. C. 379 and other cases thereafter decided.

In the second place the fact that there was no member of the race to which the defendant belongs on the grand jury that found the bill of indictment against him, was not violative of the Constitution, statutes, or laws of the United States, unless there was a discrimination against his race by the constitution, statutes or laws of South Carolina, or in the administration thereof, on account of race color or previous condition of servitude.

In the case of Gibson *v.* Mississippi, 162 U. S. 569 Mr. Justice Harlan, voicing the opinion of the court, after quoting the provision of the statute, that "no citizen possessing all other qualifications, which are or may be prescribed by law, shall be dis-
22 qualified from service, as grand or petit juror, in any court of the United States, or of any State, on account of race color or previous condition of servitude," says: "While a State consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males to freeholders, to citizens, to

persons within certain ages, or to persons having educational qualifications, and while a mixed jury is not within the meaning of the Constitution, always or absolutely necessary to the enjoyment of the equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as matter of right, that his race shall be represented on the jury, yet, a denial to citizens of the African, race, *because of their color*, of the right or privilege accorded to white citizens, of participating as jurors, in the administration of justice, would be a discrimination against the former, inconsistent with the amendment, and within the power of Congress, by appropriate legislation to prevent" * * *

The exception is overruled.

The second exception is as follows:

"2. Because his, honor, Judge Gary, the presiding judge, erred in refusing the challenge to the array of grand and petit jurors on same ground."

This exception is disposed of by what was said in considering the first exception.

While the question was not properly made by the exceptions, this court will, nevertheless, *in favorem vitæ* consider whether his honor the presiding judge erred in overruling the motion to quash the indictment, and in refusing to sustain the challenge to the array of grand and petit jurors, on the ground that there was no testimony to sustain the facts therein alleged.

In order to determine this question it will be necessary to state the facts that appear in the agreed case.

23 It seems that a difference arose between the *respec* respective attorneys of record, as to the facts of the case, whereupon they signed the following agreement to wit:

"We hereby agree that his honor Judge Gary make a statement as to his rulings upon the motion to quash the indictment, and also as to the motion to challenge the array of grand and petit jurors in the case, and also as to requests to charge, and such statement shall be the agreed statement for the purposes of this appeal.

J. L. MITCHELL AND
W. J. WHIPPER,
Attorneys for Defendant, Appellant.
JOHN S. WILSON,
Solicitor for State, Respondent."

Statement of Judge Gary.

On the motion to quash the venire, I overruled the same on two grounds.

1. Because the statement of facts set out in the grounds for quashing the same, did not appear from the records or otherwise. That not being personally acquainted with the jurors selected, I could not assume the facts to be as alleged.

2. Because the constitution of this State prescribed the qualification of a juror in sec. 22 of article 5 in the following words: "Each

juror must be a qualified elector under the provisions of this constitution, between the ages of twenty-one and sixty-five years and of good moral character." I then suggested that counsel could examine each juror on his *voir dire* and ascertain if he was qualified, and in the absence of any showing to the contrary, I was bound to assume that the jury commissioners had done the jury in the premises. As to the 16th request, I have no recollection, as I marked the requests presented and turned them over to the stenographer.

ERNEST GARY,
Presiding Judge.

May 4th 1901.

24 The last line in the agreed case is: "Above signed with relation to case as settled by judge."

It is true the words: "The defendant offered to introduce testimony to support these grounds," appear in the record just after the statement that "the motion being overruled by the court the defendant's counsel excepted," but they evidently refer to the offer in the motion to quash the indictment, and not thereafter, as the said words are inconsistent with the statement made by his honor the presiding judge in pursuance of the agreement of counsel hereinbefore mentioned.

Furthermore, it was not contended by the appellant's attorneys upon the hearing of the appeal herein, that there was any offer to introduce testimony to support the allegations in the motion to quash, other than the offer therein made.

We will therefore consider this question in the light of the fact just mentioned, that the appellant did not offer testimony to sustain the allegation in the motion to quash further than the mere offer alleged in said motion.

In Carter *v.* Texas 177 U. S. 442 the court says:

"When the defendant has no opportunity to challenge the grand jury, which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken, either by plea in abatement or by motion to quash the indictment, before pleading in bar. United States *vs.* Gayle 109 U. S. 65, 67.

The motion to quash on such a ground being based on allegations of fact not appearing in the record, those allegations, if controverted by the attorney for the State, must be supported by evidence on the part of the defendant" citing Smoth *v.* Mississippi 162, U S. 592, 601. Williams *vs.* Mississippi 170 U. S. 213

25 In Smith *vs.* Mississippi the court uses this language: "No evidence was offered in support of the, motion by the accused to quash the indictment, unless the facts set out in the written motion to quash verified 'to the best of his knowledge & belief' can be regarded as evidence in support of the motion. We are of opinion that it could not properly be so regarded. The case differs from Neal *v.* Delaware 103 U. S. 370, 394, 396," The court then proceeded to show wherein the difference consisted.

Proceeding the court says: "The facts stated in the written motion to quash although that motion was verified by the affisavit of

the accused, could not be used as evidence to establish those facts, except with the consent of the State prosecutor, or by order of the trial court. No such consent was given. No such order was made. The grounds assigned for quashing the indictment should have been sustained by distinct evidence, introduced or offered to be introduced by the accused. He could not, of right, insist that the facts stated in the motion to quash should be taken as true simply because his motion was verified by his affidavit.

The motion to quash was, therefore, unsupported by any competent evidence, consequently, it cannot be held to have been erroneously denied." These authorities are conclusive of the question under consideration.

The third exception is as follows:

3. "Because his honor the presiding judge, erred in refusing to charge the jury, as requested by defendant's attorneys, as the eighth proposition: That 'an arrest, even if lawful, made in such a menacing manner as to threaten death or bodily harm, is held to justify resistance even to the killing of an officer.' (Am. & Eng. Cy. of Law, 2d ed., vol. 2–980.")

This request was erroneous in that it eliminated from the consideration of the jury the conduct of the defendant, and was therefore properly refused. This exception is overruled.

The fourth exception is as follows:

26 "Because his honor, the presiding judge erred in refusing to charge the jury in the above-entitled cause, as requested by defendant's attorneys, as the ninth proposition: That 'if the testimony shows that the deceased J. C. Scurry assaulted the defendant, John Brownfield, with a pistol in such a manner as to produce the belief that he was about to take the defendant's life or inflict upon him great bodily harm at the time that he fired the fatal shot, it makes no difference whether deceased intended to take the defendant's life or to do him bodily harm or not, the shooting was justifiable, the killing excusable, and the defendant should be acquitted.' (Wharton on Homicide 215, 216, 217 and 219; State *vs.* Jackson 32 S. C. 27, 10 S. E. 760; State *vs.* Symmes 40 S. C. 383.")

This exception does not specify in what particular there was error on the part of his honor the presiding judge, but waiving this objection the request was erroneous, as it failed to take into consideration the conduct of the defendant, and fu-thermore would have been a charge on the facts. It was therefore properly refused, and the exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed and the case remanded to that court for the purpose of having another day assigned for the execution of the sentence of the court.

Endorsed on cover: File No. 18,276. South Carolina supreme court. Term No. 172 John Brownfield plaintiff in error, *vs.* The State of South Carolina. Filed October 2nd, 1901.